

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

LIMIN GAO, *Applicant*

vs.

**CHEVRON CORPORATION, self-insured and administered by BROADSPIRE,
*Defendant***

**Adjudication Number: ADJ10024232
Bakersfield District Office**

**OPINION AND ORDER
GRANTING PETITION FOR REMOVAL
AND DECISION AFTER REMOVAL
(Significant Panel Decision)**

Applicant Limin Gao seeks removal of the August 25, 2020 Order Continuing Trial, wherein the WCJ ordered that applicant's trial be continued indefinitely in light of the Covid-19 pandemic, until such time as the trial can be completed utilizing in-person testimony. Applicant contends that the WCJ violated her due process rights by not allowing her to be heard before ordering the trial continued, and by concluding that the trial cannot proceed via remote testimony.

We received an Answer from Chevron Corporation ("Chevron"). The WCJ prepared a Report and Recommendation on Petition for Removal (Report), recommending that the Petition be denied. We also received a request from applicant to file a Supplemental Petition, which we will accept pursuant to WCAB Rule 10964 (Cal. Code Regs., tit. 8, § 10964).

We have considered the Petition for Removal, the Answer, the Supplemental Petition, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition, rescind the Order Continuing Trial, and return the case to the WCJ for further proceedings consistent with this decision.

FACTS

Applicant filed an Application for Adjudication, alleging a psyche injury sustained while employed by Chevron from May 2, 2014 to July 2, 2015. The matter proceeded to trial on

March 10, 2020. Applicant provided in-person testimony, both direct and on cross-examination, flying in from her current residence in Ontario, Canada in order to do so. Because the trial could not be completed in one session, the trial was continued to June 9, 2020, with in-person testimony contemplated from several defense witnesses.

In light of the Covid-19 pandemic, WCAB District Offices stopped conducting in-person trials as of March 16, 2020. (See Department of Industrial Relations Newslines, Release No. 2020-20, available at <https://www.dir.ca.gov/DIRNews/2020/2020-20.html>.) Beginning May 4, 2020, WCAB District Offices began to hear trials on the case-in-chief remotely, via phone link. (See Department of Industrial Relations Newslines, Release No. 2020-37, available at <https://www.dir.ca.gov/DIRNews/2020/2020-37.html>.)

On May 7, 2020, the State of California's Governor, Gavin Newsom, issued Executive Order N-63-20, stating as relevant here:

Any statute or regulation that permits a party or witness to participate in a hearing in person, a member of the public to be physically present at the place where a presiding officer conducts a hearing, or a party to object to a presiding officer conducting all or part of a hearing by telephone, television, or other electronic means, is suspended, provided that all of the following requirements are satisfied:

- a) Each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits;
- b) A member of the public who is otherwise entitled to observe the hearing may observe the hearing using electronic means; and
- c) The presiding officer satisfies all requirements of the Americans with Disabilities Act and Unruh Civil Rights Act.

(Executive Order N-63-20 may be accessed here: <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.7.20-EO-N-63-20.pdf>.)

As the June 9, 2020¹ trial date approached, the parties made clear they had very different ideas about how the case should proceed. Applicant favored proceeding via remote testimony, while defendant objected, requesting a continuance until in-person testimony could be elicited from its three rebuttal witnesses. On June 9, 2020, applicant filed a petition to allow remote testimony, arguing the case was ripe for such testimony given the pandemic, that applicant's

¹ At some point not entirely clear from the record, it appears that the trial was again continued, this time to September 1, 2020. The Petition for Removal states that this was in response to a June 2, 2020 letter by defendant, which was granted that day without awaiting a response from applicant. (See Petition for Removal, at p. 3.) Subsequent events having mooted the issue, we do not consider this continuance further in our decision.

demeanor had already been observed in-person, that she resided in Canada, and that the WCAB had indicated the capability to conduct remote trials in a May 28, 2020 press release. (See WCAB Newsline Release No. 2020-48, accessible at <https://www.dir.ca.gov/DIRNews/2020/2020-48.html>.)

Extended remote back-and-forth between the parties and the judge largely related to the logistical ability to conduct such a trial ultimately resulted in the WCJ issuing a letter to the parties, dated August 20, 2020, stating that it was possible to conduct a video trial, and asking whether either party objected to completing the trial via that format. Defendant filed an objection on August 24, 2020, stating it was opposed to a trial via any method except in-person testimony, and seeking a continuance until in-person testimony could safely be provided.

On August 25, 2020, apparently without waiting for a response from applicant, the WCJ issued the Order Continuing September 1, 2020 Trial, stating that due process required continuing the trial to allow for in-person testimony from defendant's witnesses, because applicant had previously given in-person testimony. (Order Continuing September 1, 2020 Trial, at p. 1.) The matter was continued to "such time as in-person testimony can again be taken." (*Id.*)

This Petition for Removal followed.

DISCUSSION

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).)

Initially, we note that much of the delay in this case was occasioned by a lack of clarity as to what remote trial procedures were practicable. At this point, based upon the Petition, the Report, and the Answer, it appears that a remote video trial is now realistically possible for all parties, and that this was the case when the WCJ issued the Order Continuing Trial. Therefore, the choice for

the WCJ was between continuing the trial to allow for in-person testimony, or proceeding with a video trial. With those alternatives in mind, we turn to the due process rights of the parties.

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is “. . . one of ‘the rudiments of fair play’ assured to every litigant . . .” (*Id.* at 158.) A fair hearing includes but is not limited to the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal. Comp. Cases 584]; *Rucker, supra*, 82 Cal.App.4th at 157-158 citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

The “essence of due process is simply notice and the opportunity to be heard.” (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 928, 936 [88 Cal.Rptr.2d 516].) Determining an issue without giving the parties notice and an opportunity to be heard violates the parties' rights to due process. (*Gangwish, supra*, 89 Cal.App.4th 1284, 1295, citing *Rucker, supra*, 82 Cal.App.4th 151, 157-158.)

Due process requires “a ‘hearing appropriate to the nature of the case.’” (*In re James Q.* (2000) 81 Cal.App.4th 255, 265, quoting *Mullane v. Cent. Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 313.) Although due process is “a flexible concept which depends upon the circumstances and a balancing of various factors,” it generally requires the right to present relevant evidence. (*In re Jeanette V.* (1998) 68 Cal.App.4th 811, 817.)

The object of the workers' compensation system is to “accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character.” (Cal. Const., art. XIV, § 4.) To that end, under Labor Code Section 5709, “[n]o informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, or rule[.]” (Cal. Lab. Code, § 5709.)

In this case, the WCJ issued a letter on August 20, 2020 asking whether the parties would be amenable to a video trial, then continued the trial on August 25, 2020, the day after receiving an objection from defendant, without providing applicant an opportunity to be heard. Under the circumstances, we do not believe this course of action was consistent with due process; at a

minimum, applicant should have been given the chance to respond to defendant's objection in some form before the WCJ took action on the matter, especially given the open-ended nature of the continuance the WCJ granted. Therefore, we will rescind the Order Continuing Trial, and return the matter to the WCJ to set a remote hearing at which the parties may be heard on this issue.

With that hearing in mind, we briefly address the WCJ's assertion in the Report that due process required continuing the trial in this matter because applicant testified in person, and therefore defendant's witnesses must be afforded the same opportunity. Although we allow that it might offend due process to *arbitrarily* prohibit one party's witnesses from providing in-person testimony while allowing it from the other party, that was not the situation here. The WCAB's transition to remote hearings is not based upon some bureaucratic whimsy, but rather upon the advent of a global pandemic that has cost the lives of hundreds of thousands, and caused fundamental shifts in the behavior of most of the world's population. Due process is the process that is due under the circumstances as we find them, not as we might wish them to be. Executive Order N-63-20 represents the Governor's best judgment as to how to strike a fair balance between the due process rights of participants in hearings, the necessity of protecting the public from real and significant harm, and the state's responsibilities under the California Constitution to provide efficient, timely resolution of disputes in order to secure benefits for eligible injured workers.

To be sure, each case must be resolved according to its own particular circumstances, and it would therefore be inappropriate to institute a blanket rule that it is *per se* unreasonable to continue a case to allow for in-person testimony. However, in consideration of Executive Order N-63-20, the purposes of the workers' compensation system, and current conditions, the default position should be that trials proceed remotely, in the absence of some clear reason why the facts of a specific case require a continuance. Moreover, as the party seeking the continuance, the burden should be on defendant in this case to demonstrate why a continuance is required.

Thus, we grant applicant's Petition, rescind the Order and return the matter to the WCJ for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Removal of the August 25, 2020 Order Continuing Trial is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Removal of the Workers' Compensation Appeals Board, that the August 25, 2020 Order Continuing Trial is **RESCINDED**, and that the matter is returned to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 12, 2021

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

**LIMIN GAO
GHITTERMAN & GHITTERMAN
MULLEN & FILIPPI**

AW/bea

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*